UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF OHIO
WESTERN DIVISION

RONALD MELTON, et al.,	:	**CASE NO. 1:01cv00528**
	:	**(J. Spiegel, Mag. J. Sherman)**
Plaintiffs	:	
	:	
vs.	:	
	:	
BOARD OF COUNTY COMMISSIONERS OF HAMILTON COUNTY, OHIO, et al.,	:	
	:	
Defendants	:	

MOTION OF DEFENDANTS BOARD OF COUNTY COMMISSIONERS OF HAMILTON COUNTY, OHIO, NEYER, DOWLIN, PORTUNE, AND PFALZGRAF FOR SUMMARY JUDGMENT

Pursuant to Rule 56 of the Federal Rules of Civil Procedure, Defendants, Tom Neyer, Jr., John S. Dowlin and Todd Portune, individually and on behalf of Hamilton County, Ohio in their capacity as official representatives of the County, and Robert Pfalzgraf, M.D. (referred to herein collectively as "Defendants"), request that this Court grant summary judgment in their favor as to all issues as there are no genuine issues of material fact, and thus, Defendants are entitled to judgment as a matter of law. Grounds for this motion are set forth more fully in the accompanying Memorandum in Support.

M E M O R A N D U M

I. INTRODUCTION

On July 7, 2002, Plaintiffs, in the above-captioned matter, filed a Second Amended Complaint (the "Complaint") against numerous defendants including the Board of County Commissioners of Hamilton County, Ohio, Tom Neyer, Jr., John S. Dowlin and Todd Portune, individually and on behalf of Hamilton County, Ohio, in their capacity as official representatives of the County, and Robert Pfalzgraf, M.D. The Complaint alleges damages resulting from photographs taken of the body of Perry Melton, deceased, "for commercial purposes while his body was in the care, custody and control of the Hamilton County Coroner, all without due process of law and in violation of the equal protection provided by law." Complaint at para. 1. In addition, the Complaint asserts purported state common law tort claims against all Defendants. This Court has dismissed the pendent state common law tort claims and Plaintiffs have re-filed those claims in state court. As a result, the only claims pending before this Court are Plaintiffs' federal Constitutional claims.

While it remains unclear, hidden amidst innuendo and unsubstantiated allegations, precisely what Constitutional violations Plaintiffs are asserting, for purposes of the present motion for summary judgment, Defendants assume that Plaintiffs allege violations of due process and equal protection under the Fifth and Fourteenth Amendments, and a general violation of the Constitutional right to privacy.

This case involves one photograph taken of the body of Mr. Melton on November 9, 2000. As this court is likely well aware a class action in the case of *Chesher v. Neyer*, et. al., Case No. C-1-01-566, is proceeding simultaneously with the above-captioned matter. In that case, the class of Plaintiffs allege that Defendant Thomas Condon ("Condon") gained access to and photographed certain dead bodies being held at the Hamilton County morgue over a five month period. The present case, however, is based on only one photograph, taken by Dr. Jonathan Tobias in the regular course of his business as a pathologist for the Hamilton County Morgue. The record is clear that Mr. Condon was in no way involved with the taking of the photograph at issue in the present case.

As discussed more fully below, the autopsy photograph taken of Mr. Melton's body, which represents the complete and total basis of the case at bar, clearly was appropriate in that it was taken in the ordinary course of business of the Coroner's Office. Neither the negative nor the photograph was published by any representative of the Coroner's Office and was not used for any commercial or other improper purpose. Simply stated, the sole basis for Plaintiffs' claims in this case is a properly taken autopsy photograph used for a proper purpose.

Therefore, Defendants move for summary judgment with respect to all claims asserted in the Complaint and in all capacities in which they have been sued. As discussed fully below; first, the undisputed facts of record establish that Defendants committed no Constitutional violations; and second, Defendants Neyer, Dowlin, Portune and Pfalzgraf are entitled to qualified immunity with respect to Plaintiffs' federal civil rights claims.

II. BACKGROUND

A. Statement of Facts

Defendant Dr. Jonathan Tobias ("Tobias") was a fellow employed by the Hamilton County Morgue at all times relevant to the present matter. *See* Deposition of Jonathan Tobias, M.D., in the case of *Chesher v. Neyer*, C-1-01-566 ("Tobias Dep."), at 424-425.[a] During the first several weeks of his fellowship, Tobias assisted on autopsies. *Id.* Once he became more familiar with his job responsibilities, Tobias began doing autopsies under the supervision of the pathologist. *Id.* Eventually, Tobias was permitted to do autopsies by himself although there was always another pathologist in the building or on call when he was performing an autopsy by himself. *Id.*, at 426-427.

During his fellowship, Tobias worked at the morgue approximately 50 hours per week. He was also on call on some weekends and evenings. Tobias Dep., at 429. Dr. Tobias first went to a death scene as part of his job responsibilities with the Coroner's Office in July, 2000. On that occasion, he was accompanied by investigators who assisted him in performing the necessary responsibilities. Tobias Dep., at 33-34. By September, 2000, Dr. Tobias was given discretion with respect to crime scene investigations. *Id.*, at 38.

The first time Tobias met with Defendant Thomas Condon was at the morgue on August 16, 2000. Tobias Dep., at 97. Dr. Tobias did not see Thomas Condon at the morgue between August 16, 2000, and November 10, 2000. *Id.*, at 100-101. There is nothing in the record to indicate that Condon was in any way involved in the taking or developing of the one picture of Mr. Melton on which this case is based.

Dr. Tobias took a photograph of the body of Perry Melton at the Hamilton County Morgue at approximately 6:30 p.m. to 7:00 p.m. on November 9, 2000, in the normal course of his job duties. *See* Tobias Dep. at 107. Earlier that day, Tobias had learned he would be doing the autopsy of Mr. Melton on November 10th. He did not go to the death scene to investigate, and when the body was brought to the morgue, Tobias used the last exposure on his camera to take a single photograph. *Id.*, at 108. It was Tobias' intention that if the prints from the single negative were of sufficient quality he would put one photograph in the Coroner's Office file with respect to Mr. Melton and keep one photograph for his teaching file. *Id.*, at 117.

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[a] The parties to this lawsuit have stipulated that all depositions taken in *Chesher* case may be filed and used in this case. (January 16, 2004, Deposition of Jonathan Tobias, M.D., Attached as Exhibit 1, at 6:1-7:1). The deposition of Tobias taken in the *Chesher* case was filed with the Court on January 28, 2004. The deposition of Tobias in the present case is attached as Exhibit 1 to this motion.

Condon was not at the morgue when the photograph was taken on November 9, 2000. *See* Tobias Dep. at 119. Tobias developed the film into a negative at his home. He then took the negative of the photograph to Condon's studio in December in order to develop that negative and others he had taken with relation to his work. He did not complete the developing process, and left the partially developed prints at Condon's studio. Apparently, Condon still had test prints of the negative of Melton's body in his photography lab when the police searched his studio. *Id.*, at 115-116.

The photograph taken of Mr. Melton's body was taken in the ordinary course of business of the Coroner's Office, and Condon never came into contact with or viewed the body of Perry Melton while it was in the morgue. *See* Tobias Affidavit, para. 7 and 8. Neither the negative nor the photograph was published by any representative of the Coroner's Office and Tobias did not authorize Condon to use the photograph for any purpose. No evidence exists that Condon made any use of the photograph in question. In fact, there is no evidence suggesting that Condon even saw the photograph.

III. ARGUMENT

A. Standard For Summary Judgment

The procedure for determining whether summary judgment is appropriate is set forth in Civil Rule 56:

> The judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(c).

The moving party has the initial burden of demonstrating that no genuine issue of material fact exists and that the moving party is entitled to judgment as a matter of law. To meet this burden, the moving party may rely upon the evidentiary materials identified in Civil Rule 56(c) or may merely rely upon the failure of the opposing party to make a showing sufficient to establish the existence of one or more elements essential to that party's case and upon which that party will carry the burden of proof at trial. *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986); *see also Cox v. Kentucky Dept. of Trans.*, 53 F.3d 146, 149 (6th Cir. 1995). "Essentially, a motion for summary judgment is a means by which to 'challenge the opposing party to 'put up or shut up' on a critical issue.'" *Cox*, 53 F.3d at 149 (*citing Street v. J.C. Bradford & Co.*, 886 F.2d 1472, 1477 (6th Cir. 1989)).

If the moving party satisfies its initial burden, then the burden shifts to the nonmoving party to produce evidence that results in a conflict of material fact to be resolved by a jury. Although the nonmoving party is to be accorded all reasonable inferences, the nonmoving party "cannot rely on the hope that the trier of fact will disbelieve the movant's denial of the disputed fact, but must 'present affirmative evidence in order to defeat a properly supported motion for summary judgment.'" *Hanlin v. Ohio Builders & Remodelers, Inc.*, 212 F. Supp. 2d 752, 755 (S.D. Ohio 2002) (*quoting Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986)). The nonmoving party must come forward with more than a mere scintilla of evidence to overcome a motion for summary judgment. *Id.* (*citing Matsushita Electronic Indus. Co., Ltd. v. Zenith Radio Corp.*, 745 U.S. 574 (1986)). A trial court no longer is required to search the entire record to establish that it is bereft of a genuine issue of material fact. *Id.* Instead, the nonmoving party has an affirmative duty to direct the trial court's attention to those specific portions of the record upon which it relies to create a genuine issue of material fact. *Id.*

In addition, the Sixth Circuit has concluded that, in the "new era" of summary judgments, trial courts have been afforded considerably more discretion in evaluating the weight of the nonmoving party's evidence. *Street*, 886 F.2d at 1480. The nonmoving party is required to "do more than simply show that there is some metaphysical doubt as to the material facts." *Id.*; *see also Cox*, 53 F.3d at 149. If the record in its entirety could not convince a rational trier of fact to return a verdict in favor of the nonmoving party, the motion for summary judgment should be granted. *Id.* Moreover, it is well established that complex cases and cases involving state of mind issues are not necessarily inappropriate for summary judgment. *The Scotts Company v. Central Garden & Pet Co.*, 2002 WL 1578787 (S.D. Ohio 2002).

B. Summary Judgment Is Appropriate As To Each Defendant

1. Robert Pfalzgraf, M.D.

Defendant Pfalzgraf is a pathologist, an assistant to the coroner, and was in charge of the fellowship program at the Coroners' office. In that capacity Pfalzgraf supervised Tobias who ultimately took and developed the photograph that forms the basis of this case. In their Complaint, Plaintiffs simply regurgitate a laundry list of conclusory factual allegations that cannot possibly apply to Pfalzgraf. Plaintiffs assert that Pfalzgraf, among other things, "improperly granted defendant Condon access to the body of Perry Melton and/or the official file, including but not limited to photographs, of the Decedent, Perry Melton . . ." Complaint at para. 44(a). However, there is simply no evidence in the record to support these conclusory allegations. The above-referenced example is just one instance in which Plaintiffs attempt to extend liability to Pfalzgraf individually despite the fact that he was not in any way involved in the events that have led to the filing of the above-captioned lawsuit. Based on the complete absence of any evidence in the record of Pfalzgraf's involvement in said events, and the following legal argument, the present motion for summary judgment should be granted as applied to Pfalzgraf.

2. Tom Neyer, Jr., John S. Dowlin and Todd Portune In Their Individual Capacity

Plaintiffs' have not, at any time over the course of the litigation, articulated a legitimate factual and/or legal basis for the claims asserted against the Hamilton County Commissioners in their individual capacity. On December 23, 2002, Plaintiffs' counsel circulated a proposed Stipulation of Voluntary Partial Dismissal of the Commissioners in their individual capacity. Defendants' understanding at that time was that all parties agreed to dismissal. However, it does not appear that Plaintiffs' counsel ever filed the executed copy of that agreement with the Court. For this reason, the claims asserted against the Commissioners in their individual capacity are fully addressed herein.

The law is clear that a claim against a governmental employee is actually a claim against the governmental entity itself if the employee is sued in his official capacity. *See Kentucky v. Graham*, 473 U.S. 159, 165 (1985). Such a claim against an individual employee is, thus, subsumed in the claim against the governmental entity, and cannot be maintained independently. *Id.* In order to sue a governmental employee in his personal capacity, Plaintiffs must make a showing of specific wrongful conduct on behalf of said employee. *See generally*, *Scheuer v. Rhodes*, 416 U.S. 232, 237-38 (1974). Discovery in this matter has clearly demonstrated that no factual or legal basis exists for so including the County Commissioners in their individual capacity. It is clear from the well-developed record in this matter that the County Commissioners in their individual capacity were in no way involved in the events that led up to the filing of this lawsuit. The record is clear that the individual County Commissioners did not have anything to do with the taking, developing or handling of the photograph at issue, and to assert otherwise is preposterous. Based on that fact it is wholly inappropriate for the individual Commissioners to be named in this action. Defendants request that the Court grant summary judgment and dismiss the frivolous and inexplicable claims against the County Commissioners in their individual capacity.

3. Tom Neyer, Jr., John S. Dowlin and Todd Portune On behalf of Hamilton County, Ohio, In Their Capacity As Official Representatives Of The County

Plaintiffs further attempt to extend liability to the County Commissioners in their capacity as official representatives of Hamilton County. Plaintiffs simply restate the conclusory allegations against other Defendants, including Pfalzgraf, against the Commissioners. Complaint at para. 86-90. The law is clear that a governmental entity may not be held liable under § 1983 for an employee's conduct on the basis of *respondeat superior*. *Culberson v. Doan,* 125 F.Supp.2d 252, 272 (2001) (citing *Monell v. Department of Soc. Servs. of City of New York*, 436 U.S. 658, 690 (1978)). Rather, Plaintiffs must show that the governmental entity itself is the wrongdoer. *Id.* (citing *Collins v. City of Harker Heights*, 503 U.S. 159, 165 (1985)).

There is nothing in the record to even indicate that the County was involved in any wrongdoing. To the contrary, the record shows that the photograph in question was properly taken by an employee of the Hamilton County Morgue for a business purpose. Based on the well developed record in this matter, it is clear that no wrongdoing took place. Therefore, this Court should grant summary judgment on behalf of the County Commissioners in their representative capacity.

C. Analysis

1. Plaintiffs' Federal Constitutional Rights Were Not Violated

a. Plaintiff's Due Process Rights Were Not Violated.

Defendants are entitled to summary judgment on Plaintiffs' due process claim as a matter of law whether the claim is for an alleged violation of substantive due process or procedural due process.

i. Substantive Due Process

This Court has made clear that an affirmative duty to protect arises only where the state has affirmatively acted to restrain the individual's freedom to act on his own behalf. *Culberson v. Village of Blanchester*, 125 F. Supp. 2d 252, 267 (S.D. Ohio 2000). It is this restraint, and not the failure to protect that triggers the Due Process Clause. *Id.*, at 268. A claim for substantive due process arises when the state conduct complained of violates personal privacy and bodily security in a manner which "shocks the conscience". *Id.*, at 270-271.

Conduct that "shocks the conscience" as articulated by the United States Supreme Court must be "so brutal and offensive" that it does not comport with traditional ideas of fair play and decency. *Id.* (citing *Whitley v. Albers*, 475 U.S. 312, 327 (1986) *see also*, *Callahan v. Sudimack*, 117 F.3d 1420 (6th Cir. 1997) (holding that refusal to conduct autopsy in order to discover true cause of death did not rise to level of substantive due process violation); *Webb v. McCullough*, 828 F.2d 1151, 1158 (6th Cir. 1987) (holding "[s]ubstantive due process is concerned with violations of personal rights of privacy and bodily security . . . inquiry must be whether the force applied caused injury so severe, and was so inspired by malice or sadism . . . that it amounted to a brutal and inhumane abuse of official power literally shocking to the conscience”)).

The Due Process Clause of the Fourteenth Amendment “[d]oes not transform every tort committed by a state actor into a constitutional violation.” *Reed v. Knox County Dept. of Human Services*, 968 F.Supp. 1212, 1216 (S.D. Ohio, E.D. 1997). As discussed above, the state act must be so brutal, sadistic, malicious and demeaning that it would literally “shock the conscience” of a reasonable person. *Id.*; *see also, Barrett v. Outlet Broadcasting*, 22 F.Supp.2d 726, 738-39 (6th Cir. 1997) (holding act by law enforcement officers who permitted a television news crew to enter suicide victims home, disturb the deceased corpse, and items in the bedroom, and film her body and suicide scene on national television shocked the conscience).

In the case at bar, Plaintiffs’ allegations of misconduct only extend to the act of taking a negative from one photograph to an outside studio for development. No misconduct whatsoever can be extended to such an act, and the record clearly demonstrates that the photograph was legitimately taken by a pathologist in the Coroner’s Office for a business purpose. Nowhere do Plaintiffs allege that the body of the deceased was improperly touched or manipulated, nor was any photograph of the decedent published or used in any other way commercial or otherwise. The photograph was a public record to be placed into Mr. Melton’s file. There is nothing in the record that even indicates the possibility of conduct so brutal or demeaning to even approach the level of severity and egregiousness necessary to meet the “shocks the conscience” standard.

ii. Procedural Due Process

In order to state a valid procedural due process claim, a plaintiff must show a deprivation of life, liberty, or property under color of state law. *Brotherton v. Cleveland*, 923 F.2d 477, 479 (6th Cir. 1991). A plaintiff must also show: (1) the conduct was caused by an "established state procedure rather than random and unauthorized action"; or (2) the means of redress for property deprivations provided by the State of Ohio fails to satisfy the requirements of procedural due process. *Id.*

In the case at bar, Plaintiffs have not been deprived of any life, liberty or property interest. Tobias was a pathologist with the Hamilton County Coroner's Office who had a clear business purpose for taking the photograph of the decedent. The photograph was not published or used for any other commercial purpose and was in the process of being developed for official business purposes at the time it was seized by the police as evidence in a criminal proceeding. The photograph was published by the police as part of the evidence in the criminal trial and, pursuant to Ohio law, is a public record. *See* Ohio Revised Codes §§313.10 and 149.43.

In addition, no evidence exists to show that the Hamilton County Coroner's Office had a pattern or practice of making commercial use of photographs of decedents in the morgue. As a result, even if commercial use had been made of this photograph it would have been a random act not giving rise to a claim under procedural due process. *See Parratt v. Taylor*, 451 U.S. 527 (1981). Since Plaintiffs were not deprived of a protected interest and there existed no pattern or practice of the alleged misconduct, Plaintiffs cannot maintain a claim for procedural due process.

b. Plaintiffs Were Not Denied Equal Protection of the Law

Plaintiffs' Complaint alleges a claim for the denial of Plaintiffs' equal protection rights under the Fourteenth Amendment. To support this claim, Plaintiffs allege only that Defendants denied them equal protection of the law. Because Plaintiffs allege no protected class or discriminatory conduct, it is assumed Plaintiffs' claim is based upon the "class of one" theory identified in *Village of Willowbrook v. Olech*, 528 U.S. 562, 564 (2000). In that case, the Supreme Court recognized "successful equal protection claims brought by a 'class of one,' where the plaintiff alleges that she has been intentionally treated differently from others similarly situated and that there is no rational basis for the difference in treatment." *Id.*

In the case at bar, no evidence exists that Plaintiffs have been treated differently from others similarly situated. On the contrary, the photograph was taken of the body of the decedent anticipatory of an autopsy and for a specific business purpose. The photograph was taken, along with other business photographs, to an outside lab for development. While in a partial state of development at the lab, the negatives were confiscated by the police, along with other negatives, and published as evidence in a criminal trial. No act by Defendants can conceivably be construed to constitute a violation of plaintiffs' rights to equal protection.

c. Plaintiffs' Right to Privacy Was Not Violated

The United States Constitution does not contain any specific guarantee of the right to privacy. *Paul v. Davis*, 424 U.S. 693 (1976). The Supreme Court has recognized that "zones of privacy" may be created by more specific constitutional guarantees and thereby impose limits upon government power. *Id; see also, Roe v. Wade*, 410 U.S. 113 (1973). In *Roe*, the Court pointed out that the personal rights found in the guarantee of personal privacy must be limited to those which are "fundamental" or "implicit in the concept of ordered liberty" as described in *Palko v. Connecticut*, 302 U.S. 319 (1937).

While the bodies of living persons may be shielded by the Constitution from physical invasions and alterations under the right of privacy, it is clear that the bodies of dead persons are not afforded such protection under the United States Constitution *See e.g., Property, Privacy, and the Human Body*, 80 B.U.L. Rev. 359, 446 (2000). Dead bodies are essentially 'divorced' from the person and are thus no longer shielded under the umbrella of privacy. *Id.* Dead persons retain no privacy interests in their own bodies and family members possess privacy interests only in their ongoing relationships with the living. *Property, Privacy, and the Human Body*, 80 B.U.L. Rev. 359, 446 (2000). This is because 42 U.S.C. § 1983 does not provide a cause of action on behalf of a deceased person based upon an alleged violation of the decedent's civil rights which occurred after his death. *Guyton v. Phillips*, 606 F.2d 248, 249 (9th Cir. 1979). A "deceased" is not a "person" for the purposes of 42 U.S.C. § 1983, nor for the constitutional rights which the Civil Rights Act serves to protect. *Id.* As the court in *Guyton* explained:

> There is no indication in the legislative history of the Civil Rights Act that Congress meant to depart from [the] general meaning of the word "person" when it used the term in 42 U.S.C. § 1983, nor do we find any case law which would imply that the protection of the Civil Rights Act would extend to dead human beings.

Id. The court in *Guyton* continued, "[R]elevant cases suggest that the definition of a 'person' for purposes of protection of constitutional rights is limited only to a living human being." *Id.*, citing, *Roe v. Wade*, 410 U.S. 113, 158 (1973) (holding a fetus is not a "person" for purposes of the Fourteenth Amendment).

It is well settled that a §1983 claim is entirely personal to the direct victim of the alleged violation and that a deceased's civil rights terminate upon death. *Claybrook v. Birchwell*, 119 F.3d 350 (6th Cir. 2000); *Callihan v. Sudimack*, 117 F.3d 1420 (6th Cir. 1997)(unpublished, see attached). Further, no cause of action may lie under 42 U.S.C. §1983 for emotional distress, loss of a loved one, or any consequent collateral injuries suffered by the victims' family members. *Claybrook v. Birchwell, supra*. A deceased retains no right to privacy after his death as privacy rights are personal and may not be asserted by third persons. *Cordell v. Detective Publications*, 419 F.2d 989 (6th Cir. 1969).

Thus, because 42 U.S.C. § 1983 does not provide a cause of action on behalf of a decedent based upon an alleged violation of the decedents' civil rights that occurred after their death, Plaintiffs must establish a deprivation of their own rights under the Constitution or laws of the United States. *Callahan v. Sudimack*, 117 F.3d 1420 (6th Cir. 1997).

Presumably the Constitutional "privacy" interest with which Plaintiffs are concerned involves the disclosure of personal matters – the photograph of the deceased. However, the Sixth Circuit has concluded that "the Constitution does not encompass a general right to nondisclosure of private information," as for those cases cited as standing for the proposition that there is a constitutional right to nondisclosure of private information, "none cites a constitutional provision in support of its holding." *D. Overstreet v. Lexington-Fayette Urban County Government*, 305 F.3d 566, 573 (6th Cir. 2002).

The record is clear that no cause of action can exist even if Plaintiffs could maintain a claim for invasion of the Constitutional right to privacy as the photograph in question was not published, and is a public record pursuant to Ohio Revised Code §313.10 and §149.43. Plaintiffs simply cannot maintain a Constitutional right to privacy claim on behalf of the decedent as such a claim cannot be maintained by a third party. Simply stated, Plaintiffs would have to be in the photograph in order to assert such a claim. Plaintiffs further cannot maintain a Constitutional right to privacy claim on there own behalf as no such right has been violated.

2. Defendants Are Entitled To Qualified Immunity

The doctrine of qualified immunity, as discussed more fully below, protects officials in civil cases from damages' liability if there conduct does not "violate clearly established statutory or constitutional rights of which a reasonable person would have known." *Harlow v. Fitzgerald*, 457 U.S. 800, 818-819 (1982). While the record in this case clearly demonstrates that no wrongdoing whatsoever has occurred, even if such wrongdoing did occur, Plaintiffs would be totally barred from bringing such claims under the doctrine of qualified immunity. It is clear from the record – in fact Plaintiffs do not make any allegations in the Complaint – that Defendants, in their individual capacity, were not involved in the events precipitating the filing of this lawsuit. Plaintiffs, as demonstrated more fully below, do not present sufficient evidence to create a genuine issue as to whether Defendants committed any acts that violated the law. *Adams v. Metiva*, 31 F.3d 375, 386 (6th Cir. 1994). Therefore, summary judgment should be granted to Defendants based on the doctrine of qualified immunity.

a. Qualified Immunity Standard

Qualified immunity is the doctrine that holds that, "government officials performing discretionary functions generally are shielded from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982), citing, *Procunier v. Navarette*, 434 U.S. 555m 565 (1978)).

The Supreme Court established the qualified immunity doctrine to limit officials' exposure to litigation in order to advance three policy considerations.

> First, the Court fears that it would be unfair to require public officials to compensate plaintiffs for all constitutional violations, given the sometimes unclear nature of constitutional law. Second, the Court speculates that public officials would be overdeterred in the performance of their duties if they anticipate that every official action they take may lead to a lawsuit. Finally, the Court believes that the litigation of constitutional torts may impose substantial costs on individual officials and on the government itself, even when the trial court finds that the officials are not liable.

The Burdens of Qualified Immunity: Summary Judgment and the Role of Facts in Constitutional Tort Law, 47 Am. U.L. Rev. 1 (1997).

In order to effectuate the above-enumerated policy considerations, the Sixth Circuit applies a two-part test to determine whether a government official is entitled to the defense of qualified immunity: (1) whether the plaintiff has shown a violation of a constitutionally protected right; and, if so (2) whether that right was clearly established such that a reasonable official would have understood that his behavior violated that right. *Key v. Grayson*, 179 F.3d 996, 999 (1999), citing, *Summer v. Bennett*, 157 F.3d 1054, 1058 (6th Cir. 1998). Thus, the first prong hinges on a determination of whether or not the plaintiff has shown a violation of a constitutionally protected right.

To determine the second prong of the analysis – whether a right was clearly established for purposes of qualified immunity – the Sixth Circuit looks first to decisions of the Supreme Court, then to decisions of other courts within the circuit, and finally to decisions of other circuits. *Id.* citing, *Chappel v. Montgomery County Fire Protection Dist. 1*, 131 F.3d 564, 579 (6th Cir. 1997). "For qualified immunity to be surrendered, pre-existing law must dictate, that is, truly compel, (not just suggest or allow to raise a question about), the conclusion for every like-situated, reasonable government agent that what defendant is doing violates federal law in the circumstances." *Id.*, at 1000, citing, *Saylor v. Board of Educ.*, 118 F.3d 507, 515 (6th Cir. 1997). The burden of convincing a court that the law was clearly established "rests squarely with the plaintiff." *Id.*, citing, *Cope v. Heltsley*, 128 F.3d 452, 459 (6th Cir. 1997).

For the Constitutional right to be clearly established, the law must be clear in regard to the official's particular actions in the particular situation. *Id.*, citing *Walton v. City of Southfield*, 995 F.2d 131, 1335 (6th Cir. 1993). The conduct of the official must fall clearly within the area protected by the constitutional right, such that a reasonable official would have known that his conduct violated the constitutional right. *Id.*, citing, *Long v. Norris*, 929 F.2d 1111, 1115 (6th Cir. 1991).

The entitlement, articulated in *Harlow* and the ensuing cases, is an **immunity from suit** rather than a mere defense to liability; and like an absolute immunity, it is effectively lost if a case is erroneously permitted to go to trial." *Mitchell v. Forsyth*, 472 U.S. 511, 526 (1985). As the Supreme Court developed the test for application of qualified immunity, it required that the issue be settled no later than the summary judgment stage. *Anderson v. Creighton and Qualified Immunity*, 50 Ohio St. L.J. 447, 448 (1989). The Court reasoned that if a defendant who raises the qualified immunity defense must submit to trial to be found entitled to immunity, the purpose of immunity – not to be forced to submit to trial – would be defeated. *Mitchell v. Forsyth*, 472 U.S. 511, 525-26 (1985).

The Supreme Court, in *Harlow v. Fitzgerald*, reasoned that bare allegations of malice should not suffice to subject government officials either to the costs of trial or to the burdens of broad reaching discovery. 457 U.S. 800, 817 (1982). Thus, qualified immunity, like absolute immunity, is not simply an entitlement not to stand trial under certain circumstances, but an immunity from litigation. *Id.* Indeed, the Supreme Court has emphasized that even such pretrial matters as discovery are to be avoided if possible, as inquiries of this kind can be disruptive of effective government. *Id.*

Thus, in deciding a motion for summary judgment in a case in which the defendant has plead the defense of qualified immunity, the plaintiff must make out a violation of a clearly established constitutional right, and whether the plaintiff has done so, is a question of law for the court. *Jackson v. City of Columbus*, 67 F.Supp.2d 839, 855 (S.D.Ohio 1998), citing, *Siegert v. Gilley*, 500 U.S. 226, 232 (1991). In cases in which the defendants have asserted the defense of qualified immunity the inquiry by a trial court in a motion for summary judgment is different from an inquiry into such motion under all other circumstances. *Pennington v. Bucan*, 620 F.Supp. 877, 879 (S.D. Ohio 1985). In such a motion for summary judgment, the judge may determine, not only the currently applicable law, but whether that law was clearly established at the time an action occurred. *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982). The resolution of these legal issues will entail consideration of the factual allegations that make up the Plaintiffs' claim for relief. *Mitchell v. Forsyth*, 472 U.S. 511, 526 (1985).

b. Defendants Are Entitled To Qualified Immunity As To All Claims

Based on the foregoing discussion and the well-developed record in this matter, it is clear that Plaintiffs' Constitutional rights were not violated. The record has clearly established that the photograph of the decedent was taken in the regular course of business (as is the case with all other autopsy photos). The photograph was never published or used for any other commercial purpose. In fact, the photograph itself is a public record.

However, even if the Court finds that the facts warrant further inquiry, Defendants are entitled to qualified immunity, as defined above, as Plaintiffs can not establish a violation of their rights to due process, equal protection, or the right to privacy. Further, Plaintiffs can not establish that these rights, if violated, were "clearly established" at the time of Defendants' alleged conduct.

After extensive discovery in this matter, Plaintiffs have not provided any evidence to even suggest that there was a deprivation of life, liberty, or property under color of state law. *Brotherton v. Cleveland*, 923 F.2d 477, 479 (6th Cir. 1991). The photograph in question was properly taken and never published or used in any other commercial manner.

Furthermore, as discussed above, it is well settled that a deceased cannot maintain an action for violations of Constitutional rights that occurred post-mortem – only living persons are protected by the Constitution. Plaintiffs, as a third party, cannot assert Constitutional claims on behalf of the deceased and there was clearly no violation of any Constitutional right as applied to Plaintiffs themselves. The photograph in question is a public record, taken properly, and used for a proper business purpose. The record in this matter simply does not provide any factual support for Plaintiffs to sustain a claim for which relief can be granted.

IV. CONCLUSION

Based on the foregoing, Defendants Board of County Commissioners of Hamilton County, Ohio, Tom Neyer, Jr., John S. Dowlin and Todd Portune, individually and on behalf of Hamilton County, Ohio, in their capacity as official representatives of the County, and Robert Pfalzgraf, M.D., respectfully requests that this Court grant summary judgment in their favor on all issues.

Respectfully submitted,

/s/ Louis F. Gilligan

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing was served upon David W. Kapor, 36 East Seventh Street, Suite 1520, Cincinnati, Ohio 45202, Michael B. Ganson, 36 East Seventh Street, Suite 1540, Cincinnati, Ohio 45202, Larry E. Barbiere, Schroeder, Maundrell, Barbiere & Powers, 11935 Mason Road, Suite 100, Cincinnati, Ohio 45249, Stephen Patsfall, 1 West Fourth Street, Suite 1800, Cincinnati, Ohio 45202 and Glenn Whitaker and Victor Walton, Jr., Vorys, Sater, Seymour and Pease LLP, Suite 2000, Atrium Two, 221 East Fourth Street, Cincinnati, Ohio 45202by ordinary U.S. mail, this 2nd day of February, 2004.

/s/ Louis. F. Gilligan

Louis F. Gilligan